

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 168 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

HEMLATA C PATAK

Appearance:

MR MA BUKHARI, AGP for Appellant
MR NS DESAI for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 22/09/2000

ORAL JUDGEMENT

1. Second Appeal No. 95 of 1984 was on Board today and learned AGP Mr. M.A. Bukhari and learned advocate Mr. N.S. Desai, jointly requested to call for the papers of this Appeal on Board because the similar

question is involved in that Second Appeal, and that Mr. Bukhari for the Government and Mr.N.S.Desai for the respondents are representing the parties in this Appeal also, and they are prepared to argue this Second Appeal. Hence, the papers were called for on the Board and both the learned advocates were heard.

2. This Appeal is filed by original defendant, State of Gujarat, appellant in Regular Civil Appeal No. 36 of 1982, being aggrieved by the judgment and order of the learned District Judge, Amreli, in Regular Civil Suit No. 175 of 1979, thereby the learned District Judge, Amreli was pleased to dismiss the above said Appeal of original defendant and confirmed the judgment and decree of Regular Civil Suit No. 175 of 1979 passed by the learned Civil Judge (SD), Amreli.

3. Present respondent - Hemlata Chamaklall Pathak, filed the above said Regular Civil Suit No. 175 of 1979 in the court of learned Civil Judge (SD), Amreli, against the present appellant - State of Gujarat for declaration and injunction. The case of the plaintiff was that she was the owner of Plot bearing Survey No. 293/1, which was situated in Manek Para area of Amreli. The plaintiff further contended that the said plot was purchased by her through a sale deed dated 2nd April, 1971 including construction over it. The said construction was made without the permission of the Collector and, therefore, powers vested under him under Section 66 of the Bombay Land Revenue Code, Collector Amreli, initiated proceedings against the plaintiff - present respondent, vide order dated 25th April, 1973. Collector imposed recovery of the amount of Rs. 2,000/- by way of composition fee and penalty and N.A. Assessment. The plaintiff contended that the order of the Collector to recover the composition fee was illegal and ultra vires. Therefore, a declaration and permanent injunction was sought by the plaintiff. In defence, the State of Gujarat denied the suit in toto and contended that the order of the Collector was legal and valid. It was further contended that the suit was time barred. That the said court had no jurisdiction to entertain the suit. The Notice under Sec. 80 was not legal and valid and on these grounds, the dismissal of the suit was urged. It was further contended that the plaintiff has given undertaking to the Collector that she would pay compensation fee, and therefore, she was estopped from contending that the Collector was not authorised to recover composition fees.

4. Learned Civil Judge (SD), Amreli, decreed the

above said Civil Suit in favour of the plaintiff and declared that the defendant was not entitled to recover composition fee from the plaintiff, but was entitled to recover the amount of N.A. Assessment and penalty from the plaintiff. The defendant - State was permanently restrained to recover the composition fee from the plaintiff. Being aggrieved by this judgment and decree dated 10th February, 1982, passed by the learned Civil Judge (SD), Amreli, original defendant - State of Gujarat filed a Regular Civil Appeal in the Court of District Judge, Amreli, being Regular Civil Appeal No. 36 of 1982. Learned Assistant Judge, Amreli, was pleased to dismiss the said Appeal, vide his judgment and order dated 10th November, 1983. Therefore, this Second Appeal by the State - original defendant.

5. Learned AGP Mr. M.A. Bukhari for the appellant and learned Advocate Mr. N.S. Desai, for the respondents were heard at length.

6. The substantial question of law arises for consideration is, whether the Collector had authority to levy composition fees and that whether the suit was barred by law of limitation and whether the Civil Court had no jurisdiction to try the suit under Section 11 of the Bombay Land Revenue Code?

7. So far as the levy of Non-agricultural Assessment and penalty is concerned, the suit of the plaintiff was dismissed and the plaintiff has not filed any Appeal against this decree of the trial court. Now, learned AGP Mr. M.A. Bukhari challenged the judgment and decree of both the courts below on the ground that the Collector had power to levy composition fees because of the decision of the Government in shape of GR which are the executive instructions and in pursuance of this, the composition fees was levied by the Collector. Secondly, it was urged that the plaintiff since she had given an undertaking to pay composition fee, she was estopped from taking a stand that the Collector had no authority to levy composition fees.

8. The contention that Collector had an authority to levy composition fee and that plaintiff was estopped from challenging the action of the State is covered by two decisions of the Supreme Court. In case of STATE OF ASSAM vs. BASANTA KUMAR, reported in AIR 1973 SC 1252, wherein the Supreme Court held that the executive directions cannot take place of substantial law and hence when there is no provision empowering the Authorities to levy such fine. The authority concerned cannot impose

such fine or levy merely on the executive directions. Therefore, so far as this case is concerned, the State failed to show any provision or statute by which the Collector is empowered to levy composition fees and when there is no such provision, levy of composition by Collector would be without any authority and ultra vires. It is made clear by the Supreme Court that the executive directions cannot take place of substantial law, therefore, unless and until the substantial law permits or authorises the Collector to levy composition fees, the levying of composition fees by the Collector, would be an act without an authority and not in pursuance of law. Mere administrative direction by the Government would not authorise a Collector to levy composition fees. In this view of the matter, both the courts below had rightly held that the Collector had no authority to levy composition fees and the suit on that count was rightly decreed by the trial court and appeal was dismissed by the First Appellate Court.

9. So far as the question of estoppel is concerned, the issue is covered by a decision of the Supreme Court in the matter of SHRI KRISHNA vs. KURUSHETRA UNIVERSITY, reported in AIR 1976 SC 376, wherein it has been observed that when an undertaking is given or taken by any person in ignorance of his legal rights, then, the same will not be binding to him. Therefore, in this case also, when the plaintiff executed an undertaking, the same was in ignorance of her rights that the levy of composition fees was against the law and the undertaking given therefore by the plaintiff would not be binding on her. Such an undertaking, which is not supported by the law as well as executed in the ignorance of the rights of the party would not be binding on such party. Therefore, the contention that the plaintiff is estopped, has no merit.

10. So far as the question of jurisdiction of the Civil Court is concerned, it is clear that the suit is not filed for the action taken by the revenue authority in pursuance of the Bombay Land Revenue Code, but the Suit is filed to challenge the action of the Collector imposing the composition fees, which was without authority and, therefore, it could not be said that the Civil Court had no jurisdiction to try the suit and the same was barred by Section 11 of the Bombay Land Revenue Code. The suit was filed to challenge a void ab initio order and therefore it would not be covered by Article 100 of the Limitation Act. The order of Collector which is challenged is non-est in the nature. Any such non est order can be challenged by the party in a civil suit when such non est orders are being executed by the concerned

authority and, therefore, the contention that the suit was required to be brought within one year from the passing of the order, has no substance at all.

11. In this view of the matter, both courts below rightly held that the Collector has no authority to levy composition fees and that the suit was without limitation and was not barred by Section 11 of the Bombay Land Revenue Code.

12. In the result, there is no substance in the Appeal, the same is dismissed with no order as to costs.

(J.R. Vora, J.)

p.n.nair